Choctaw Nation of Oklahoma

Historic Preservation

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Comments on the Federal Register Notice Volume 82, Number 89/Wednesday, May 10, 2017 Regarding Federal Communications Commission 47 CFR Parts 1 and 17 [WT Docket No. 17-79; FCC 17-38] Accelerating Wireless Broadband Barriers to Infrastructure Investment

June 15, 2017

By Robert Cast, Tribal Archaeologist Choctaw Nation of Oklahoma and Ian Thompson, Tribal Historic Preservation Officer, Choctaw Nation of Oklahoma

The Choctaw Nation of Oklahoma values its government-to-government relationship with the Federal Communications Commission (FCC). On a day-to-day basis, we honor this relationship by reviewing communications tower construction projects under the National Historic Preservation Act (NHPA). This is done through the Tower Construction Notification System (TCNS), created by the FCC, with the input of both Tribes and Industry. From our perspective, this is perhaps the most efficient system for consultation under NHPA in existence. It is working quite well.

Since 2014, the Choctaw Nation has reviewed 1,318 projects in our 9 state area of historic interest through the TCNS system. Ninety-seven percent (97.4 %) of the TCNS review requests received over the past year have in turn, received substantive responses within 30 days or less. While each of these projects builds important infrastructure, they also have the potential for irreparably damaging the human remains, sacred sites, and historic properties of our ancestors. Far more than bones and stones, these sites are at the very core of the culture and identity of our more than 200,000 Tribal citizens. Last year, we reviewed a project through the TCNS system that would have adversely affected the Choctaw Academy historic site in Kentucky. This site is connected to our treaties with the United States government; it was the home and place of education for dozens of our Tribal leaders from the last century, and has been on the National Register of Historic Places since 1972. Despite all of this, the Choctaw Academy was overlooked by the archaeologists who conducted the historic properties survey for the tower. Choctaw Nation's involvement brought this issue to light. We worked with the FCC and applicant to change the project design in such a way that the tower could still be constructed, but with minimal impact to this significant historic site (See Letter from Gary D. Batton, Chief of the Choctaw Nation dated February 28, 2017).

Please consider the following comments:

National Historic Preservation Act Definition of Undertaking

There should be no argument as to whether or not the construction and deployment of Small Cell and Distributed Antenna Systems (DAS) are *undertakings* as defined by federal law. The definition is clear in the Advisory Council on Historic Preservation's (ACHP) 36 CFR Part 800 regulations for the protection of historic properties:

> "[A] project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a federal permit, license or approval."

FCC licenses spectrum use throughout the country. The construction of Small Cell and the deployment of Distributed Antenna Systems (DAS) are therefore federally *licensed* radio services and subsequently *undertakings*.

National Environmental Policy Act (NEPA)

Congress enacted the NEPA to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."

Section 101 [42 USC § 4331] of the Act further states that it is the responsibility of the Federal Government to improve and coordinate Federal plans, functions, programs and resources to the end that the Nation may:

1. Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. Assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. preserve important historic, cultural and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has responsibility to contribute to the preservation and enhancement of the environment.

Hand in hand with the NEPA is the Environmental Justice Executive Order 12898. "Each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands."

From the past FCC Chairman's 2016 Broadband Progress Report there still remains a digital divide between rural and urban communities. In the introduction of the report, the Commission states: "We find that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion...as our efforts have helped increase deployment, many Americans still lack access to advanced telecommunications capability, especially in rural areas and on Tribal lands. The disparity between advanced telecommunication capabilities available to rural and urban Americans persists." The report goes on to state that 39 percent of Americans living in rural areas lack access to advanced telecommunications capability, as compared to 4 percent of Americans living in urban areas, and approximately 41 percent of Americans living on Tribal lands lack access to advanced telecommunications capability.

Chairman Pai commenting on the 2016 report stated that "It's all about rural America." "Americans living in rural areas and Tribal lands disproportionately lack access." These are important factors to consider as a Nation in regard to Environmental Justice and NEPA compliance. FCC cannot ignore this discrepancy any longer. We hope that FCC will be able to balance protecting the historic, cultural, and natural aspects of our human heritage, the interests of Tribal Nations and rural communities while expanding affordable 5G technology. At this time however, it is evident that rural communities still lack many of the technologies that urban communities often take for granted; access to nearby hospitals, access to health facilities that can provide quick and sufficient care, access to long-term health management plans using password protected technologies which can "chart" individual patient's needs based on Doctor's information, Doctor's explanations of diagnosis and treatments provided directly to the patient through follow-up emails, access to essential emergency management services and capabilities with wireless technologies connected to medical facilities that can direct and provide treatments in real time to incidents and access to inter-connected educational facilities that can receive and share learning tools and materials quickly from classroom to classroom across the Nation. These are just a few of the basic needs of rural communities and their infrastructures.

Tower Construction Notification System (TCNS)

The TCNS is the most efficient and effective way for Tribal Nations to work with the wireless communications industry and FCC for compliance with Section 106 of the National Historic Preservation Act. The TCNS however and its use with SHPOs, contractors, and Tribal Nations need to be explicitly guided and governed by the FCC.

Exemptions

Pole replacements would not have any effect if the prior pole had no effect to historic properties (from ground disturbance or visual effects) and if the new pole would be no taller than the replaced pole and within the footprint of the original ground disturbance.

Most THPOs and tribal preservation offices seek to streamline and provide better ways of doing business under the Section 106 process. Any time certain projects can be excluded from review allows our offices and staff to work on projects of more pressing importance. We agree that in some cases that the DAS will have very little to no impact on historic properties, however, the small cell deployments within rights-of-way may have affects that the industry has not considered. We are willing to consult with all the parties related to these concerns.

Rights of Way should not be exempt or expedited simply because it is assumed that they are in "disturbed contexts." As per the Nationwide Programmatic Agreement (NPA) signed by the Commission, the NCSHPO, and the ACHP regarding rights of way:

"The draft further states that it may be assumed that no archeological resources exist where all areas to be excavated will be located on ground that has been previously disturbed to a depth of two feet or six inches deeper than the general depth of the anticipated disturbance (excluding footings and similar limited areas), whichever is greater, and no archeological resources are recorded in public files of the SHPO/THPO or any potentially affected Indian tribe or NHO. In other words, if the ground to be excavated has been previously disturbed, the applicant must research the SHPO/THPO's and Tribe/NHO's files, and if no records of archeological resources are found, it may assume that no survey is necessary" (Emphasis added).

From this, it is the responsibility of the contractor/consultant doing the environmental/archeological reviews to "research the SHPO/THPO's and Tribe/NHO's files, and if no records of archeological resources are found, it may assume that no survey is necessary." It appears that Industry wants to exclude this all-important aspect of the agreement process; asking the Tribal Nations if they know about sites in the rights-of-ways.

There are numerous examples of important archeological and historical sites that were discovered in "disturbed contexts." What is the process when Industry inadvertently damages significant sites or irreplaceable resources in one of these disturbed contexts?

For example, in 1997 the Texas Department of Transportation "identified subsurface associated features with the early mission" the (1795-1830) Spanish Colonial Mission Nuestra Senora del Refugio (41RF1) "in the highway right of way." In 1999 the mission's cemetery (*campo santo*) was also discovered. 165 burial features were excavated.

Most recently, reports from the University of Mississippi's Medical Center campus estimated that 7000 graves could be on the campus (May 6th, 2017 USA Today). They also estimate a cost of nearly 21 million dollars to exhume and rebury the individuals. In 2013 the university had found 66 coffins while constructing a road on the 164 acre campus.

Significant historic properties and cemeteries that have been encountered in what was considered to be previously disturbed contexts also include: (African Burial Ground, now a National Monument in New York City, the Freedman's Cemetery in Dallas, Texas, the Dutch Lovelace Tavern foundation and a 18th century cistern in Lower Manhattan, Lemon Hill Choctaw Cemetery in Bryan County, Oklahoma, to name only a few). These examples underscore that simply stating that there would be "no effect" to historic properties because the ground was previously disturbed does not necessarily make it so.

Consultants and contractors doing the archeological/environmental work for the Industry should provide locational and background information related to the specific right-of-way and be able to verify research of the Tribal Nation's and SHPO files as per the agreement regarding the right-of-way, as part of a "reasonable and good faith effort" for FCC to consider effects to historic properties. "Historic properties" are not exclusively "archeological resources" as suggested by the wording of the NPA but can be *places* of religious and cultural significance to Tribal Nations.

Collocations in many cases are already exempted from review per the Nationwide Programmatic Agreement. We believe that many of the collocations could be exempted from any tribal review, if these were adequately explained regarding their placement, the context of the collocation within the historic district; and the visual corridors surrounding the historic district. If a collocation is in an "urban" area the consultant still needs to verify that a Tribal Nation does not have a historical connection to the urban area or district. Of course, collocations indoors will not be a preservation concern for the Choctaw Nation of Oklahoma.

Many of the recent public comments on the NPRM showed outrage that a certain telecommunications company could erect a tower in their community with no involvement of the people that actually lived in the community. The majority of the complaints were based on aesthetics and the view of the tower in sharp contrast within the natural beauty and landscape of the community in which the people live. Maintaining and preserving the aesthetic qualities of the Nation are one of the Congressional purposes found in the National Historic Preservation Act (NHPA) and is in the public interest:

> (4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generation of Americans; (Section 1 of the NHPA, Pub. L. No. 89-665, as amended by Pub. L. No. 96-515)

Allowing towers and collocations to go up wherever the wireless industry needs them does not fulfill the spirit of the NHPA, the public interest, or congressional intent. Tribal Nations are willing and ready to work with the wireless communications industry to find solutions to their needs to expedite 5G technology but they must also be willing to consider historic properties and federal laws that guide this process.

Timing, Deemed Granted, and Shot Clocks

If a Tribal Nation does not respond in a timely manner, we agree that the process should proceed; however, it should be verified that the contractor made every effort to contact the tribe and received no response. In some cases, both the Tribal Nations and contractors have agreed to a "no response" within a certain time period as a "go ahead."

Deemed Granted

We agree that the FCC has the authority to adopt *irrebuttable presumptions* establishing as a matter of rule the maximum reasonable amount of time available to review a wireless application. Specific timelines are nothing new for Tribal Nations with THPO programs and SHPOs across the United States. The 36 CFR Part 800 regulations set out specific timelines (30 days) for reviews from SHPO/THPO and Tribal Nations for projects involving undertakings. As a program alternative to Section 106, the FCC delegated authority to consultants working for industry to initiate consultations and discuss appropriate protocols concerning a Nationwide Programmatic Agreement (NPA). The FCC/ACHP/NCSHPO NPA also set specific timelines through the TCNS for responses which we have always tried to honor. Tribal Nations, states and local municipalities should adhere to these guidelines as set in the agreement as we believe this is a reasonable amount of time to respond to a project.

Moreover, a "deemed granted" remedy is reasonable when there is no response and every effort has been made to obtain one. In the Section 106 process if there is a "no response" after 30 days from SHPO, THPO or Tribal Nations then the project undertaking can move forward.

Shot Clocks

The "shot clock" should start only when the consultant has provided all the information for review. FCC should be made aware immediately when a Tribal Nation does not have the information that they need from the consultant/contractor. Once a request for more information from a Tribal Nation (or SHPO) is made, this should be documented through the TCNS and FCC. Industry (and their consultants) should not be able to continue to use their own ineptitude and their intentional abuse of the time limit as a tool to give the appearance that Tribal Nations are not responding in a timely manner and therefore the "barriers" to wireless communications deployment. Unless there is oversight, Industry can continue to abuse time limits. In reviewing Positive Train Control towers, the Choctaw Nation of Oklahoma repeatedly experienced consultants and or Industry withholding the information necessary for the tribe to review the projects and prematurely beginning the "shot clock." This prevented Choctaw Nation from reviewing some of these projects and falsely made it appear that the Choctaw Nation was holding up the process.

Tribal Fees

For years the Choctaw Nation of Oklahoma participated in the TCNS review process without charging fees. In 2014, only as a result of anticipated increase in workload with PTC review, did we begin to charge fees in order to build the capacity necessary to continue to respond to project review requests in a timely fashion, given the increase in review requests. This was at a time when some industry consultants said that they could no longer share archeological reports with us. We had to take staff time

to contact state offices directly for this information and sometimes pay fees. In response to this situation, we hired dedicated staff for TCNS/PTC review; we hired secondary staff to build and maintain databases of Choctaw historic sites and Choctaw place names. Putting together this infrastructure required significant resources on the part of the tribe, including staff time and often paying fees to state agencies for access to their databases containing information about our own archeological sites. Our fee schedule was created by considering the number of hours invested in answering (1) one TCNS review request and in consideration of the fees charged by our own State Historic Preservation Office for staff time. This is NOT a money-making endeavor but the income does allow us to get responses to Industry in a timely manner based upon the best available information.

Discussion on whether or not tribal fees can be charged should be a moot point regarding the NPRM. Article 1, Section 8 gives Congress authority, (not the ACHP or the FCC) "To regulate commerce with foreign nations and among the several states, and with the Indian tribes." Although the ACHP provided *guidance* on whether or not Tribal Nations could actually charge fees, they have no authority to do so. In the Memorandum from July 6, 2001, the ACHP states:

> "The applicant or agency is free to refuse, but retains the obligation for obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on the historic properties. Ultimately, the Federal agency must be able to demonstrate that it made the "reasonable and good faith effort" that Section 800.4(b) of the Section 106 regulations requires."

The FCC and the ACHP should truly recognize and acknowledge that Tribal Nations have a "special expertise" that no other consultants, contractors, or the applicant possesses. The 36 CFR Part 800.4(c)(1) regulations state:

> The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

The ACHP Guidance further states in regard to fees: "Likewise, applicants for Federal assistance that assume responsibilities for carrying out Section 106 functions are urged to do the same. However, this encouragement by the Council is not a legal mandate nor does any portion of the NHPA or the Council's regulations require an agency or an applicant to pay for any form of tribal involvement." Does the NHPA or the Council's regulations address paying contractors working for the applicant?

How can the Federal agency make a "reasonable and good faith effort" without considering the information that Tribal Nations may have regarding historic properties of "religious and cultural significance? The fact is: The applicant/contractor doing the work for the FCC wants this information provided to them by the Tribal Nations as a part of *deliverables for which they will be paid.* Tribal Nations are not "consultants or contractors" but hold a very special status with the Federal government that obviously the ACHP overlooked in this case. The ACHP would not create fee schedules or guidance for archeologists, environmental consultants, or archeological/environmental contractors that are also a

part of the Section 106 (and the TCNS) process, yet they are paid readily for information they provide to the applicant.

The fact is: there is no other group in the Section 106 compliance process that has the expertise that Tribal Nations have. This is why it is imperative for the wireless industry and FCC to consider the comments and views of the Tribal Nations and their appointed representatives. These sites of "religious and cultural significance" are often NOT archeological sites, so an archeologist (or environmental contractor) would not recognize or consider these places as part of the identification process.

Tribal Areas of Interest

The Choctaw Nation of Oklahoma has a homeland in portions of the present-day states of Mississippi, Alabama and Florida. Throughout Colonial history and most particularly the Indian Removal Act of 1830 most of the tribe was removed from their homeland by United States federal policy against their will. Choctaw historic sites and sacred sites are today located over a (9) nine state area. Although we are a "removed" tribe, we still have both a cultural responsibility and a legal obligation to protect all of these sites. With such a large responsibility, it would be irresponsible for us to consult in areas where our ancestors were not located. As a result, we have created an Area of Interest map that defines this as precisely as possible where Choctaw ancestors were on the landscape. This map is based upon the best available information, goes down to sub-county level, and is updated from time-to-time when new information becomes available.

Amendments to the 36 CFR Part 800 regulations required Federal agency consultation with Indian tribes when "undertakings" by the agency could affect historic properties. This presented Tribal Nations an opportunity to become directly involved in protecting historic properties and sacred sites of importance to them. As Tribal Nations developed programs, their areas of interest also developed. With the advent of geographic information systems, geospatial technologies, mapping, and databases that could store enormous amounts of information, Tribal Nations also had opportunities to create maps for themselves with their areas of interest. With Internet and "smart" technologies access to information became much quicker. What would have taken months of research to find in some cases can now be downloaded in split seconds from an archive across the world. With information comes knowledge and this is no different for tribal governments developing their areas of interest.

Tribal areas of interest are not something static and must include not only "tribal lands" but ancestral, aboriginal, and ceded lands. The diversity of the Areas of Interest will be as diverse as the Tribal Nations in the United States. In many cases broader areas of interests have nothing to do with the actions of the tribe but the past policies of the Federal government that isolated, corralled, and eventually moved Tribal Nations hundreds, if not thousands of miles away from their homelands.

Whether or not a Tribal Nations Area of Interest should have a set of "standards" or "guidance" to follow should be ultimately decided by the FCC for TCNS use. Many Tribal Nations in the U.S. have a "Trail of Tears." Can or should a tribe charge a fee for the *whole state* where the trail occurs even though the tribe may have just been passing through this area? What if the trail is not known? To date, there has been no guidance from any agencies regarding these questions. FCC should specifically

address these questions related to Areas of Interest and details related to the scale of the geographical area; county to county; state to state; or region.

We do believe that through consultation and discussion, overlapping Areas of Interest can be worked out where perhaps the number of Tribal Nations or fees paid within any one overlapping area may be reduced.

Moratorium on Fee Increases and Expansion of Areas of Interest

The Choctaw Nation of Oklahoma is willing to negotiate a moratorium on any fee increases or expansions of their area of interest. From information provided by the National Association of Tribal Historic Preservation Officers (NATHPO), 64% of the tribes that responded to a survey are "interested in exploring other options for fees and small cell batches." This should be encouraging to industry. FCC has an enormous opportunity to bring together both Tribal Nations and Industry to consult, coordinate, and collaborate on decisions regarding avenues to expedite wireless communications as mandated by Congress.

Tribal Monitoring

Tribal Monitoring seems to be a concern to the wireless communications industry especially when there is overlapping Tribal Nations Areas of Interest. For a Tribal Nation to have a reason to want a monitor at a specific location the Tribal Nation should be able to verify their reasoning for such a request to the FCC. With overlapping areas, Tribal Nations may have distinctly different reasons for their request depending on the type of resources in the location of importance to each. These could be *archeological, traditional, and religious* and could also be associated with events in the history of the Tribal Nation of which the SHPO or consultant/contractor may have no knowledge. FCC should facilitate Tribal Nations requests when these arise.

Twilight Towers (Non-Compliant Towers)

The "Twilight Towers" should be an opportunity for all parties, FCC, ACHP, Industry and the Tribal Nations to work *cooperatively together* to find a reasonable solution to using these towers for collocations, if they are needed. The industry wants to collocate on towers that the Tribal Nations and the SHPOs in various states don't even know the locations of because the industry has never provided these locations to either. This should be a first step. Industry should provide maps of where the Twilight Towers are currently located, with specific information (latitude and longitude, topographic information, etc.) about when and where they were erected; along with providing photographs or examples of the type of tower, whether or not the tower is a priority in the scheme of future collocations, what other towers are associated with this one and will be subject to future collocations, and lastly, how this will benefit the mandates of Congress and the role of the FCC.

These non-compliant towers basically were constructed foreclosing the ACHP's opportunity to comment and negating a "reasonable and good faith effort" to identify and evaluate historic properties.

Any affects to historic properties still need to be addressed. What if a tower was placed in an archeological site or historic property of traditional religious and cultural significance? What are the remedies for mitigation? Is industry going to be held accountable for paying for the costs to mitigate these effects?

Which towers need expedited reviews? Which towers are in areas that would be instrumental in protecting the safety and health of American citizens? These are questions that most Tribal Nations have regarding the Twilight Towers. We believe that solutions can be worked out expeditiously but they have to involve consultation with the Tribal Nations, FCC, and industry.

We propose that a small team of knowledgeable experts from Tribal Nations and Industry visit these prioritized locations and provide expedited reviews and recommendations regarding any effects to historic properties and the cultural environment.

In March 2001, the Commission, ACHP and NCSHPO signed an initial Programmatic Agreement that excluded most collocations of antennas on existing structures from routine historic preservation review. Key elements of the Commission action included:

• Describing standards for identifying historic properties that may be affected by an undertaking and assessing effects on those properties, including a streamlined process for identifying eligible properties not listed on the National Register that may incur visual effects;

• Prescribing procedures including enforceable deadlines for SHPO and Commission review;

• Providing forms designed to standardize filings to SHPOs;

• Outlining procedures for communicating with federally recognized Indian Tribal Nations and Native Hawaiian Organizations in order to ensure protection of historic properties to which Tribal Nations and Native Hawaiian Organizations attach religious or cultural significance; and

• Establishing categories of "undertakings" that are excluded from the Section 106 review process. These exclusions include: enhancements to existing towers; replacement and temporary towers; certain towers constructed on industrial and commercial properties or in utility corridor rights-of-way; and construction in areas designated by a SHPO.

Batched Processing

Tribal Nations were involved in consultation with the FCC when "batching" was first introduced by a number of railroad companies as a way of streamlining the process for the deployment of Positive Train Control (PTC) towers. At a meeting in Tulsa, Oklahoma on December 9th-13th, 2013, Tribal Nations discussed a "consensus" list of points based on the available information regarding the upcoming Program Comment on PTCs from the ACHP. These points included:

- Use of the TCNS system
- Charge of customary administrative fee as set by each tribe

- Individual Tribal Nations may choose to charge "expedited fees" or not
- Some type of quota system based on the company size/scope, as well as numbers and locations (hence a "Beta system" suggested by the FCC to the railroads)
- Text box or other red flag that indicates "existing" vs. new construction, as well as type of pole/antenna (wayside pole vs. base tower, etc.)
- Need for points of contact information for each of the RR companies
- Deal with previous constructed towers first before submitting new ones

We would hope that FCC reaches out to the Tribal Nations and industry and will organize similar meetings between the two in regard to the deployment of small cell towers and DAS.

Tribal Nations also had a number of comments regarding the ACHP's upcoming Program Comment at that time that are pertinent to this NPRM; of note:

- Environmental impacts have not been addressed as to the PTC mandate. Individual towers may not have much of an impact, but cumulatively there may be.
- The ACHP and the FCC have a responsibility to the Indian Tribal Nations regarding the wayside poles that have already been built and need to make a clear statement regarding these.
- Define what constitutes "disturbed" lands.
- The definition of tribal lands for the purposes of Section 106 is "all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities." Tribal lands under this definition is not the only area of importance for Tribal Nations as the 36 CFR Part 800 regulations clearly state that Indian tribes may have concerns with properties of religious and cultural significance *on or off* tribal lands and specifically guides federal agencies to consider historic properties located on "ancestral, aboriginal, or ceded lands of Indian tribes" in the Section 106 process. *Of note, a number of the contractors representing the Railroad companies when producing maps of "tribal lands" had state recognized tribes listed on their maps with the federally recognized tribe for the area not even listed.*
- The option for tribal monitors to be present for initial ground disturbing at select locations. These tribal monitors would be paid as contractors by the companies at these locations.

Perhaps FCC could use some of these above comments to help facilitate discussion regarding the small cell towers and DAS deployment? What Tribal Nations found out from this meeting is that the contractors doing the work for the industry basically knew very little about any of the Tribal Nations yet they were delegated the initial engagement with the Tribal Nations and providing clearance for environmental and historic properties clearance.

<u>Broader Issues Not Addressed by the NPRM</u>

Tribal Nations have no real voice in the Nationwide Programmatic Agreement. To address the issues brought up in the NPRM the Choctaw Nation encourages the FCC to negotiate individualized Programmatic Agreements for each Tribal Nation's participation in the TCNS process. Such an approach would maintain Tribal sovereignty and provide the FCC with the opportunity to regulate the TCNS process.

The FCC did not request a NPRM when Tribal Nations were being steamrolled by the wireless industry. When the industry did provide information (because of numerous requests for it); they provided their own timelines for review, no evidence for historic properties research or cultural resources surveys on any of the tower locations, and ultimately made every final decision regarding NEPA/106 compliance with the towers. Here we are almost 20 years later and Tribal Nations still cannot even get an estimate of the number of towers that were erected without any FCC oversight. Industry has also not provided maps of these locations. We hope that FCC will actually hear, respond, and implement positive strategies based on the concerns of the Tribal Nations during the review of the NPRM. Lastly, the issuance of a NPRM should not be considered *consultation* with Tribal Nations. If changes are made to the NPRM, Tribal Nations will fully expect government-to-government consultation regarding any and all changes.

SHPO's don't have Tribal information. Tribal information is not just "archeological" and historic properties are not just "archeological."

It was disheartening to hear Commissioner O'Rielly, in referring to Tribal Nations state: "Bad actors are ruining it for everyone." FCC should be wary of reinventing a whole system based on the actions of a few or caving to the pressures of the wireless communications industry. Of course, we all know that "bad actors" exist in the wireless communications industry as well.

For Tribal Nations one of the best things regarding the TCNS is the opportunity for *participation* by Tribal Nations with concerns for protecting historic properties of traditional and religious significance to them. The system works whether Industry wants to agree with this or not. The alternative was the outright exclusion of any tribal concerns in the Section 106/NEPA process which was the standard before the TCNS was created.

The reports by industry consultants that no historic properties were found are wrong. THPO annual reports only report on what THPOs did with Historic Preservation Fund grant funds; not all TCNS Tribal Nations have THPO programs; not all THPOs are the TCNS Coordinators for their Tribe; when Tribal Nations are involved as participants in the TCNS process, only then can there be flexibility in tower siting and Section 106 compliance which has avoided many significant Tribal Nation sites and locations.

The FCC should facilitate annual or bi-annual meetings with Tribal Nations, representatives from the wireless communications industry, and consultants/contractors working for the industry. These meetings should be at the expense of industry with tribal governments reimbursed for their travel related expenses.

There have been numerous times when consultants or contractors working for the wireless communications industry either did not send Tribal Nations notifications at all as required or the 620/621 packets lacked the essential information needed to make any kind of assessment or determination. According to a NATHPO survey from January 2017, *85% of tribes do not receive adequate information in the initial submission to understand if proposed development would harm a cultural property.* When this occurs, Tribal Nations request additional information or request specific information that was lacking from the packet. Also according to the survey, when asked what information was lacking 86% of tribes reported, "All cultural sites, including those already known but not evaluated tribal sites." From the survey, 59% of the respondents stated that once they received all the information they were able to complete their identification and evaluation work within 30 days or less.

By comparison, the Oklahoma SHPO reported (comments on WT Docket No. 17-79, May 23, 2017) that "the vast majority of FCC projects are reviewed in far less than the 30 days allowed for the Section 106 process." Of the 454 projects reviewed, (2) would have an adverse effect on historic properties. Forty-six (46) of the projects did not have enough information to make an adequate review. "Thirty-eight (38) of these cases were resolved as either 'no effects' or 'no adverse effects'. The SHPO received no response to seven (7) of its requests for additional information." One adverse effect remained unresolved.

It is imperative that the consultants working for the wireless communications industry provide enough information to make a reasonable assessment.

We thank the FCC for the opportunity to make comments on this important document.

Sincerely,

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